

The Baha Mousa Public Inquiry

Inquiry Chairman: The Right Honourable Sir William Gage

Ruling on the Standard of Proof

Introduction

1. In his opening submissions to the Inquiry, Mr James Dingemans QC, on behalf of a number of soldier Core Participants represented by Kingsley Napley raised the issue of the standard of proof which I should adopt when making findings of fact in the Report. At that stage I made no ruling but stated that I would deal with this issue at a later stage in the proceedings of the Inquiry. As the Inquiry approaches the end of the evidence in Module 3 and before submissions are made, that stage has now been reached. Accordingly, I invited written submissions. I indicated that my very provisional view was that I should not apply an across-the-board standard of proof but that I should adopt a flexible approach indicating the level of satisfaction which I found established in relation to any significant finding of fact which warrants such an indication. As has been correctly pointed out by a number of counsel, this approach is the one which Dame Janet Smith DBE adopted in the Shipman Inquiry and was followed in a ruling by the “Bloody Sunday” Inquiry.

Submissions on behalf of the Core Participants and Detainees

2. I have received a range of written submissions on this issue from counsel. I summarise these submissions as follows:
 - 2.1 Mr Neil Garnham QC, counsel for the Treasury Solicitor Core Participants, submitted that I should apply an across-the-board standard of proof and that standard should be the conventional civil standard, namely the balance of probabilities.
 - 2.2 Mr James Dingemans QC, counsel for the Kingsley Napley Core Participants, submitted that the civil standard of proof should be applied but that the standard should be sub-divided into the three

categories commonly associated with the civil standard of proof, namely:

- (i) where the civil standard equates to the criminal standard for a finding in respect of allegations involving criminal conduct;
- (ii) where the civil standard of the balance of probability includes events which are inherently improbable or, as Mr Dingemans puts it, the “commonsense approach”;
- (iii) the ordinary civil standard of proof, namely a balance of probabilities where there is no issue of deliberate failings and inherent probabilities.

2.3 Mr Jason Beer, counsel for the Hill Dickinson Core Participants, submitted that the standard of proof should be approached by reference to nine different categories of alleged conduct to which the three standards of proof contended for by Mr Dingemans should be applied.

2.4 Mr Charles Bourne, counsel for the Halliwell Core Participants, submitted that conduct of a quasi criminal kind should be subject to the criminal standard of proof. All other conduct should be determined on the balance of probabilities. Mr Bourne conceded that the Inquiry has power to make other comments on matters which may not be found to the requisite standard of proof.

2.5 Miss Fiona Edington, counsel for the Lewis Cherry Core Participants, submitted that all allegations of criminal conduct should be subject to the criminal standard of proof and that all other allegations, including exculpation from criticism should be subject to the usual civil standard of proof.

2.6 Mr Michael Topolski QC, counsel for Payne, submitted that an across-the-board standard of proof should not be applied. He submitted that since all the allegations made against his client are of criminal conduct they must be subject to the criminal standard of proof.

- 2.7 Mr Timothy Langdale QC, counsel for Colonel Mendonça, adopted Mr Dingemans' submissions and Mr William England, representing Crowcroft and Fallon, made submissions similar to those made by Miss Edington.
- 2.8 Mr Rabinder Singh QC, counsel for the detainees, made submissions supporting the flexible approach. He maintained that recent case law demonstrates that there is only one civil standard of proof. He submitted that, in particular in the context of recommendations, there would be good reason to take account of some matters in my report even if they were not established to the civil standard.
3. To assist me in arriving at my conclusions on this issue counsel have referred me to a number of recent decisions on the standard of proof applicable to different proceedings before civil courts, tribunals and inquests. The principal authorities to which I have been referred are:
- 3.1 Inquests – *R v Wolverhampton Coroner, ex parte McCurbin* [1990] WLR 719; *R v HM Coroner for the County of Hampshire, ex parte HM Attorney-General* (1990);; *R (Middleton) v HM Coroner for the Western District of Somerset* [2004] 2 AC 182;
- 3.2 Decisions in which the findings may have serious consequences for the individual subject of the proceedings or report – *In re D (Secretary of State for Northern Ireland intervening)* [2008] 1 WLR 1499; *Hearing on the Report of the Chief Justice of Gibraltar* [2009] UK PC 43; *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340; *R (McCann and others) v Crown Court at Manchester* [2003] 1 AC 787; (Sex Offender Orders and Anti-social Behaviour Orders); and
- 3.3 The recent debate on the status of inherent probability in the standard of proof resolved by the Supreme Court *In re S-B (Children) (Care Proceedings: Standard of Proof)* [2010] 2 WLR 238.
4. As appears from the above summary, although put in different ways and with different emphasis, there is a considerable overlap in the submissions made

on behalf of a number of groups of Core Participants. Apart from counsel representing the Treasury Solicitor Core Participants, all other counsel accept that an across-the-board standard of proof would be inappropriate. With some differences of approach those who argue for different standards of proof do so on the basis that allegations of criminal or quasi-criminal conduct should not be found proved unless the allegations are proved to the criminal standard or the civil standard for quasi-criminal conduct. All other allegations, it is submitted, should be found proved on the civil standard of a balance of probabilities, whether on what Mr Dingemans refers to as the “commonsense” test (see Lord Hoffmann’s speech in *In re B (Children) (Care Proceedings: Standard of Proof)* [2009] 1 AC as re-stated by the Supreme Court in *S-B (Children)*) or on the usual conventional balance of probabilities.

5. It became clear in oral submissions that counsel contending for, what I shall call the Dingemans version of the appropriate standard of proof, submitted that when dealing with allegations of a quasi-criminal nature, if I were to find that such allegations were not proved to the criminal standard, it was not permissible for me to find the allegations proved to any lesser standard, for instance, on a balance of probabilities.
6. Further, all counsel, apart from Mr Evans, junior counsel for the Treasury Solicitor Core Participants, Mr Bourne, and Mr Singh submitted that if I were unable to find an allegation proved to either the criminal or ordinary civil standards of proof, it was not permissible for me to make such comments as “I suspect that soldier A was involved in such conduct”.
7. These submissions were expanded shortly in oral argument by all counsel. All counsel rightly emphasized the need for fairness. Mr Dingemans submitted that fairness dictated that any Core Participant open to criticism should know precisely what standard of proof he or she had to face when defending his or her position. Stress was placed by Mr Dingemans and other counsel on the potential serious consequences of adverse findings against any individual. Further, comments of reasonable suspicion are not likely to assuage public interest or concern.
8. Mr Dingemans, supported by other counsel, also submitted that this Inquiry, following as it does a Court Martial, ought not to make findings of criminal

conduct in respect of individuals who had been acquitted of criminal charges or those against whom similar allegations are now made, without their culpability being proved to the criminal standard of proof. Mr Evans submitted that fairness required a uniform standard of proof for all findings of fact. Further, it was the only practical way of dealing with the many issues which I have to resolve.

9. Mr Singh submitted that the approach to the standard of proof applied by the Shipman and Bloody Sunday Inquiries was the correct approach for me to adopt. He, as did counsel for the Treasury Solicitor Core Participants, underlined the difference between the inquisitorial nature of a public inquiry and adversarial litigation. He also pointed out the difference between proceedings in a public inquiry and inquests. Further, he submitted that my statutory duty is to make findings of fact *and recommendations* and that I am empowered to put in my Report anything that I consider relevant to the terms of reference.

The statutory provisions

10. In my judgment the starting point must be the Inquiries Act 2005 (the 2005 Act). The need for an inquiry arises where “particular events have caused, or are capable of causing public concern” (see s.1(1)(a)); or “there is public concern that particular events may have occurred” (see s.1(1)(b)). Thus the public interest is placed at the forefront of any inquiry.
11. Section 2 provides:
 - “(1) *An inquiry panel is not to rule on, and has no power to determine, any person’s civil or criminal liability.*
 - “(2) *But an inquiry panel is not to be inhibited in the discharge of its function by any likelihood of liability being inferred from the facts that it determines or recommendations that it makes.”*
12. Therefore the emphasis is on the Inquiry making its findings without regard to the criminal or civil liability of any individual.
13. Section 24 states:

- “(1) *The Chairman of an inquiry must deliver a report to the Minister setting out –*
- (a) *the facts determined by the inquiry panel’*
 - (b) *the recommendations of the panel (where the terms of reference required it to make recommendations.)”*

14. The 2005 Act makes no express provision as to what standard or degree of certainty is required before an inquiry is able to express its findings of fact or make its recommendations. In my judgment it must follow that it is for me to determine what standard I should apply when reaching my findings and whether or not I should approach this task by adopting an across-the-board standard or a variable standard.

Discussion

15. In deciding what my approach should be I accept Mr Singh’s submission that this Inquiry is concerned with determining what happened to the detainees and who was responsible. I am not concerned with civil liability and criminal liability. Civil liability has already been raised in civil litigation, which was settled, and criminal liability of some of the witnesses determined by Court Martial proceedings. In addition the evidence which I have heard is in many respects different from that adduced in the Court Martial
16. I accept the submissions made by both Mr Singh and Mr Garnham that the proceedings of a public inquiry are not to be confused with adversarial litigation, whether criminal or civil, or with inquest proceedings before a coroner. It is important to understand, therefore, that I am not required to decide between two competing cases; I am tasked with establishing the facts of what happened and why.
17. I am grateful to counsel for referring me to the authorities which are set out above. They assist by informing me on the standards of proof required in different proceedings, but in my judgment do not help on the issue of whether I should adopt a uniform standard of proof across-the-board. They are also decisions in proceedings which do not equate to public inquiry proceedings.
18. All counsel stressed that in making my findings I am required to act fairly. Of course, I am well aware of the need to be fair to soldiers and others whose

reputations and careers may be affected by my findings. Throughout the Inquiry I have endeavoured with counsel to the Inquiry to ensure that those who may be open to criticisms are treated fairly and I am grateful to Mr Singh for his endorsement that the level of natural justice afforded to those who may be criticised has been “above and beyond” the strict requirements of the 2006 Rules.

19. I must also be fair to the detainees who, on any view of the evidence I have so far heard, suffered serious and traumatic injuries following their arrest and detention in the TDF at Battlegroup Main between 14 and 16 September 2003. In addition, this is a Public Inquiry and it is in the public interest that my findings in the Report are expressed in such a way as can be readily understood as my judgment on what occurred, who was responsible and why I have made recommendations. In my opinion, this can best be achieved by adopting the flexible and variable standard of proof as applied in the Shipman Inquiry.
20. I recognise that in relation to some issues in this Inquiry, the more serious the allegation the more cogent must be the evidence to support a finding of wrongdoing. I must as a matter of fairness bear in mind the consequences of an adverse finding to any individual against whom serious allegations are made. However, by section 2 of the 2005 Act, I have no power to determine criminal liability, and the mere fact that criminal culpability might be inferred from my findings, does not in my judgment mean that I must adopt the criminal standard in making findings of fact. On the contrary, I think that the usual starting point will be to apply the civil standard but taking account of the “inherent improbability” concept where it properly applies.
21. There are some cases where criminal conduct is considered in the criminal courts applying the criminal standard of proof, the facts of which arise in later civil litigation where the balance of probabilities standard falls to be applied. In order properly to report who is responsible, in my judgment, I must reserve to myself the right to state, where I find the evidence sufficient, that I find a fact proved on a balance of probabilities. To do otherwise would necessarily be to limit my findings of responsibility to the high criminal standard.

22. This does not mean, however, that I shall disregard the criminal standard of proof. There may be factual issues involving allegations of serious misconduct against identifiable individuals, where I shall wish to make clear that although I am satisfied on the balance of probabilities that an individual was involved in misconduct, the evidence is not sufficient to establish that fact to the criminal standard. There may equally be factual issues where I am satisfied to the criminal standard either that an individual was involved in particular misconduct or that he can be exonerated of such misconduct. In such cases, I may again think it right to make clear in my report that I am able to reach those findings to the criminal standard. The important point is that where issues of misconduct are concerned, I must make clear the standard of proof (be it civil or criminal) to which I have been satisfied in making the relevant finding.
23. So far as all other allegations or factual disputes are concerned, in applying the balance of probabilities standard of proof the concepts of “inherent improbabilities” and “the commonsense approach” when reaching findings are concepts with which all judges of fact at first instance are familiar. These are factors which I shall have well in mind when reaching findings of fact on a balance of probabilities.
24. During the course of oral argument I canvassed with all counsel whether or not I am entitled to make comments expressing suspicion or, some other such phrase, that an allegation is true. Mr Singh submitted that I am entitled to do so; others disagreed. Mr Beer submitted that I have no power to do so because my power is only to determine the facts (s.24(1)(a) of the 2005 Act).
25. I do not accept that I may not make such comments. In my opinion the terms of s.24(1)(a) do not restrict me from doing so. In any event, as Mr Singh pointed out, s.24(1) of the 2005 Act provides that “The report may also contain anything else that the panel considers relevant to the terms of reference”. I do, however, accept and stress that by making a comment of that nature I would not be making a finding of fact. I further accept that the power to make such a comment should be exercised sparingly. Circumstances in which I will feel constrained to do so will, I believe, be comparatively rare.

26. In adopting this procedure for finding facts I do not see any unfairness arising to Core Participants from not knowing to what standard of proof allegations against them may be found proved. In preparing submissions on their behalf counsel representing them will no doubt properly seek to place their version of events in the best possible light, regardless of the variations in the standard of proof. As I have indicated, my starting point will be the civil standard. I shall not make findings of fact to a lower standard than on the balance of probabilities and I will make clear where appropriate that I am sure of a finding. This I conceive to be my duty and cannot lead to any unfairness. Equally, albeit sparingly and with fairness at the forefront of my mind, I may indicate, where appropriate, that reasonable suspicion remains in relation to an issue, but this would be a comment and not a finding of fact.

27. As to the practical difficulties envisaged by counsel for the Treasury Solicitor Core Participants, I recognise that if I were to adopt a categorisation of allegations to which only a prescriptive standard of proof could be applied, this might create unnecessary complications. However, since I propose to take the course outlined above, I am confident these complications will not arise.

Conclusions

28. For the reasons which I have endeavoured to explain I have concluded that it is right for me to approach my task by initially adopting the civil standard of proof in relation to findings of facts, but indicating where appropriate where I am sure of a finding. As I have said, I shall record the level of satisfaction which I find established in relation to any finding of fact. Thus, I shall state where necessary that I find a fact proved on the balance of probabilities or to a higher standard where appropriate. I do not think it will be necessary expressly to refer to expressions such as “inherent improbabilities” or the “bare” balance of probabilities.